

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 20-0556

BRIAN BENITEZ)	
)	
Claimant)	
)	
v.)	
)	
MATSON TERMINALS, INCORPORATED)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION c/o ACCLAIM RISK)	DATE ISSUED: 08/27/2021
MANAGEMENT)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Compensation Order on Attorney's Fees and the Order Denying Reconsideration of Attorney Fee of R. Todd Bruininks, District Director, United States Department of Labor.

James P. Aleccia and Marcy K. Mitani (Aleccia & Mitani), Long Beach, California, for Self-Insured Employer.

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals District Director R. Todd Bruininks's Compensation Order on Attorney's Fees (Compensation Order) and Order Denying Reconsideration of Attorney Fee (OWCP Nos. 15-045911, 049299, 049417, 050273, 052153, 0525553) rendered on claims filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

On November 15, 2011, Claimant's counsel, Jay L. Friedheim, submitted a fee petition to the district director seeking \$9,380 in an attorney's fee for services rendered between October 14, 2003 and October 25, 2011, while these claims were pending before the Office of Workers' Compensation Programs (OWCP). This sum represents 26.80 hours of Attorney Friedheim's services at an hourly rate of \$350. Employer filed objections to the fee on December 19, 2016, contending Claimant's counsel is not entitled to a fee under Section 28(a) or (b) of the Act, 33 U.S.C. §928(a), (b). Alternatively, Employer averred counsel is entitled to an hourly rate of \$275, the hours requested should be reduced by 75 percent, and it listed specific objections to the time requested for 35 entries.

In his order issued on September 11, 2018, the district director reduced counsel's hourly rate to \$310 and rejected Employer's objections to the number of hours requested. He awarded counsel a fee of \$8,308, representing 26.80 hours of attorney time at the rate of \$310 per hour. Employer filed a motion for reconsideration. It then appealed the district director's Compensation Order on Attorney Fees (Compensation Order) and a claims examiner's July 11, 2019 letter in response to its motion for reconsideration. The Board held the claims examiner's letter is not appealable because it is not an order issued by the district director. Accordingly, the Board dismissed Employer's appeal and remanded for the district director to address Employer's motion for reconsideration of the Compensation Order and issue an order granting or denying the relief requested. *Benitez v. Matson Terminals, Inc.*, BRB No. 19-0495 (Jan. 8, 2020) (unpub.). In his Order Denying Reconsideration of Attorney Fee (Order Denying Reconsideration), the district director

stated the hourly rate was based on a previous order in another case issued by Administrative Law Judge Jennifer Gee and that Claimant's counsel is entitled to a fee pursuant to Section 28(a) or (b) for work done before the OWCP.

Employer appeals, contending the district director's fee orders inadequately discussed its objections, and the orders summarily relied on Judge Gee's fee award to find counsel entitled to an hourly rate of \$310. The Director, Office of Workers' Compensation Programs (the Director), responds in agreement, asserting the district director failed to provide a sufficient explanation of the statutory basis for assessing an attorney's fee against Employer.¹ The Director contends the Board should vacate the fee award and remand the case for further consideration. Claimant did not respond to this appeal.

We agree with Employer and the Director that the district director's fee award cannot be affirmed. In his Compensation Order, the district director did not address Employer's objection to its fee liability under Section 28(a) or (b), and he summarily stated on reconsideration, "Mr. Friedheim is entitled to fees pursuant to Section 28 (a) or (b) as work was done before the OWCP." Order Denying Reconsideration at 1. Moreover, the district director did not cite the specific case in which Judge Gee awarded an hourly rate of \$310 or his basis for utilizing this rate beyond stating the information Claimant's counsel submitted to support the requested hourly rate in this case was presented to Judge Gee and that he will rely on her "detailed review and decision." Compensation Order at 2-3.

The district director's failure to adequately address Employer's objection to its fee liability under Section 28(a) or (b) and to state the specific case he relied upon to adopt the hourly rate awarded by Judge Gee prevents the Board's review of these findings. *See, e.g., Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); *Jensen v. Weeks Marine*, 33 BRBS 97 (1999); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). Therefore, we vacate the district director's findings with regard to Employer's liability for an attorney's fee under Section 28(a) or (b) and his hourly rate determination, and we remand the case for the district director to address Employer's objections and fully explain the basis for these findings.²

¹ The Director takes no position on Employer's appeal of the hourly rate awarded.

² In this respect, the district director must specify whether Employer's liability for Claimant's attorney's fee results from the application of Section 28(a) or Section 28(b). *See generally Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11 (2017); *Davis v. Eller & Co.*, 41 BRBS 58 (2007). If he finds Employer liable for counsel's fee, he must also explain why the hourly rate awarded comports with law. *Seachris v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021); *Shirrod v. Director, OWCP*, 809

Accordingly, we vacate the district director's Compensation Order on Attorney's Fees and Order Denying Reconsideration with respect to his liability and hourly rate findings and remand the case for further consideration consistent with this decision.³

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015); *Christensen v. Stevedoring Services of Am.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009).

³ We affirm, as unchallenged, the number of hours allowed. *See generally Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007); *Ravalli v. Pasha Mar. Services*, 36 BRBS 91, *denying recon. in* 36 BRBS 47 (2002).